(2)

No. 06-576

FILED
DEC 21 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

JES PROPERTIES, INC.
d/b/a CYPRESS TRAILS FARM, *et al.*,

Petitioners,

v.

USA EQUESTRIAN TRUST, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION OF UNITED STATES EQUESTRIAN FEDERATION, INC.

KATHERINE K. YUNKER
YUNKER & ASSOCIATES
476 E. High St.
P.O. Box 21784
Lexington, KY 40522
859-255-0629

JAMES M. LANDIS
Counsel of Record
JOHN R. HAMILTON
FOLEY & LARDNER LLP
100 N. Tampa St., Ste. 2700
P.O. Box 3391
Tampa, FL 33601
813-229-2300

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

In their two Questions Presented, Petitioners posit a conflict between a hypothetical decision and, respectively, the decision in *Billing* v. *Credit Suisse First Boston Ltd.*, 426 F.3d 130 (2nd Cir. 2005), *cert. granted sub nom. Credit Suisse First Boston Ltd.* v. *Billing*, 549 U.S. ___, No. 05-1157 (Dec. 7, 2006), and three decisions of this Court. The Eleventh Circuit's decision in this case is not as characterized in the Questions Presented. Thus, Petitioners' Questions do not present any issues that would properly be before the Court if certiorari were granted.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners JES Properties, Inc. (doing business as Cypress Trails Farm) and Michael W. Gallagher were appellants and plaintiffs below. United States Equestrian Federation, Inc. ("USEF") and the other respondents named in the caption of the Petition were named as appellees and defendants in the courts below; however, among those so named, USA Equestrian, Inc. (formerly known as the American Horse Show Association, and now known as, USA Equestrian Trust, Inc.) did not participate in Petitioners' appeal, having settled and having obtained a dismissal of all claims against it in the District Court.

CORPORATE DISCLOSURE STATEMENT

United States Equestrian Federation, Inc. ("USEF") is a nongovernmental corporation. There is no parent corporation for USEF, and no publicly-traded corporation owns 10% or more of USEF's stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings Below	ii
Corporate Disclosure Statement	iii
Table of Contents	iv
Table of Authorities	v
Opposition to Petition for Writ of Certiorari	1
Opinions Below	1
Jurisdiction	1
Statutes Involved	1
Statement of the Case	3
Reasons for Denying the Writ	16
I. The same standard was applied by the Eleventh Circuit to the Amateur Sports Act as was applied by this Court in *Silver*, *Gordon*, and *NASD* to the statutorily-established scheme for regulating securities transactions	16
II. The Eleventh Circuit's application of this Court's principles regarding implied repeal is consistent with *Billing* and in accord with other Circuits' decisions about implied repeal by the Amateur Sports Act.	22
Conclusion	30

TABLE OF AUTHORITIES

Page

CASES

Alpha Lyracom Space Comm'n, Inc. v. *Communications Satellite Corp.*, 946 F.2d 168 (2nd Cir. 1991), *cert. denied*, 502 U.S. 1096 (1992) 29

Barnes v. *International Amateur Athletic Fed'n*, 862 F. Supp. 1537 (S.D. W.Va. 1993).....27, 29

Behagen v. *Amateur Basketball Ass'n of the United States*, 884 F.2d 524 (10th Cir. 1989).....25, 26, 27, 28

Billing v. *Credit Suisse First Boston Ltd.*, 426 F.3d 130 (2nd Cir. 2005), *cert. granted sub nom. Credit Suisse First Boston Ltd.* v. *Billing*, 549 U.S. ___, No. 05-1157 (Dec. 7, 2006).....22, 23, 24, 25

Chicago Bd. of Trade v. *United States*, 246 U.S. 231 (1918)..... 17

Clarett v. *National Football League*, 369 F.3d 124 (2nd Cir. 2004)..... 25

DeFrantz v. *United States Olympic Comm.*, 492 F. Supp. 1181 (D.D.C.), *aff'd mem.*, 227 U.S. App. D.C. 210, 701 F.2d 221 (1980) 29

Deveraux v. *Amateur Softball Ass'n of Amer.*, 768 F. Supp. 618 (S.D. Ohio 1991)..... 29

Dolan v. *United States Equestrian Team, Inc.*, 257 N.J. Super. A.D. 314, 608 A.2d 434 (N.J. Super. Ct. App. Div. 1992) 29

Eleven Line, Inc. v. *North Texas State Soccer Ass'n, Inc.*, 213 F.3d 198 (5th Cir. 2000).....25 27, 28

Gordon v. *New York Stock Exch.*, 422 U.S. 659 (1975).....*passim*

Hayburn's Case, 2 Dall. 409, 1 L.Ed. 436 (1792)..... 18

TABLE OF AUTHORITIES – Continued

Page

JES Properties v. *USA Equestrian, Inc.*, 458 F.3d 1224 (11th Cir. 2006) 1

Lee v. *United States Taekwondo Union*, 331 F. Supp. 2d 1252 (D. Haw. 2004) 28

McCarthy v. *Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399 (6th Cir. 2006) 29

Michels v. *United States Olympic Comm.*, 741 F.2d 155 (7th Cir. 1984) 29

Oldfield v. *The Athletic Cong.*, 779 F.2d 505 (9th Cir. 1985) 28

Phonetele, Inc. v. *AT&T*, 664 F.2d 716 (9th Cir. 1981) 23, 24

San Francisco Arts & Athletics v. *United States Olympic Comm.*, 483 U.S. 522 (1987) 21

Silver v. *New York Stock Exch.*, 373 U.S. 341 (1975) ..... *passim*

Slaney v. *International Amateur Athletic Fed'n*, 244 F.3d 580 (7th Cir. 2001), *cert. denied*, 534 U.S. 828 (2001) 28

The Monrosa v. *Carbon Black Export, Inc.*, 359 U.S. 180 (1959) 18

Ticor Title Ins. Co. v. *Brown*, 511 U.S. 117 (1994) (per curiam) 18

United States v. *NASD*, 422 U.S. 694 (1975) 19, 20, 21, 22

Walton-Floyd v. *United States Olympic Comm.*, 965 S.W.2d 35 (Tex. App. 1998) 28, 29

TABLE OF AUTHORITIES – Continued

Page

STATUTES

15 U.S.C. § 1 1

28 U.S.C. § 1254(1) 1

36 U.S.C. § 220501-220529 3

36 U.S.C. § 220521(a) 1

36 U.S.C. § 220522

(a) 2

(a)(5) 2

(a)(7) 4

(a)(9) 4

(a)(10) 4, 5

(a)(14) 26

36 U.S.C. § 220523

(a) 9

(a)(3) 28

(a)(5) 26

36 U.S.C. § 220524

(1) 2, 3, 9

(2) 3, 14, 21, 28

FLA. STAT. ch. 542.18 11

FLA. STAT. ch. 542.19 11

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners have requested a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case. Respondent United States Equestrian Federation, Inc. ("USEF" or "Respondent") respectfully opposes Petitioners' request.

OPINIONS BELOW

Petitioners appealed from a judgment dismissing their Sherman Act §§ 1 and 2 claims and parallel state-law claims. The District Court's final judgment and order granting summary judgment to the defendants (App. A.17-57) is unpublished. The citation for the official report of the Court of Appeals' opinion (App. A.1-16) is *JES Properties, Inc.* v. *USA Equestrian, Inc.*, 458 F.3d 1224 (11th Cir. 2006).

JURISDICTION

The Eleventh Circuit entered its opinion on August 2, 2006. Although this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1), there is no compelling reason to exercise that jurisdiction to grant review in this case.

STATUTES INVOLVED

15 U.S.C. § 1 provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

36 U.S.C. § 220521(a) provides in relevant part: "For any sport which is included on the program of the Olympic Games, the Paralympic Games, or the Pan-American Games, the corporation [United States

Olympic Committee] is authorized to recognize as a national governing body . . . an amateur sports organization which files an application and is eligible for such recognition in accordance with the provisions of subsections (a) or (b) of section 220522. The corporation may recognize only one national governing body for each sport for which an application is made and approved. . . ."

36 U.S.C. § 220522(a) provides in relevant part: "An amateur sports organization is eligible to be recognized, or to continue to be recognized, as a national governing body only if it –

(5) demonstrates that it is autonomous in the governance of its sport, in that it –

(A) independently decides and controls all matters central to governance;

(B) does not delegate decision-making and control of matters central to governance; and

(C) is free from outside restraint; . . .

(10) demonstrates . . . that its board of directors and other such governing boards have established criteria and election procedures for and maintain among their voting members individuals who are actively engaged in amateur athletic competition in the sport for which recognition is sought or who have represented the United States in international amateur athletic competition within the preceding 10 years . . . and that the voting power held by such individuals is not less than 20 percent of the voting power held in its board of directors and other such governing boards;. . . ."

36 U.S.C. § 220524 provides in relevant part: "For the sport that it governs, a national governing body shall –

(1) develop interest and participation throughout the United States and be responsible to the persons and amateur sports organizations it represents;

(2) minimize, through coordination with other amateur sports organizations, conflicts in the scheduling of all practices and competitions; . . . ."

STATEMENT OF THE CASE

A. Equestrian Sport and its National Governing Body

Since 1978, the development and support of U.S. athletes in the Olympic and international equestrian disciplines have been committed to the oversight and regulation of a national governing body ("NGB") under the Ted Stevens Olympic and Amateur Sports Act ("the Act" or "ASA"), 36 U.S.C. §§ 220501-220529. A primary responsibility of the NGB for equestrian sport is to promote excellence in the sport generally, to ensure horses and American athletes can compete at the highest levels both in the United States and internationally, such as at the Olympic Games. (R. 289-8/2-3/6; R. 289-11/5-6/25-14)[1] Consequently, the NGB strives to provide "a framework that has the best meeting the best" in athletic competitions. (App. A.48-49; R. 289-11/6/11-14; R. 289-10/2/21-25) It also attempts to broaden interest and participation in equestrian sport, to provide a long-term base of support for excellence in elite competitions. (R. 289-11/5/6-15; *see* 36 U.S.C. § 220524(1)) In addition to protecting the safety of the human athletes, the NGB has an obligation to protect the

[1] "R." indicates a reference to the record before the Court of Appeals, including the district court document docket number, which may have subparts, plus page and paragraph numbers or line numbers as appropriate, as in "R. 317-14/7-8/15-16," indicating docket number 317, subpart 14, pages 7-8, paragraphs 15-16. The citation "App." refers to the appendix to the Petition, which consists of the decisions of the District Court and the Court of Appeals.

welfare of the horses in equestrian sport. (R. 289-8/3/7; R. 302, Bylaw 102)[2]

Until June 2004, the NGB for equestrian sport recognized by the United States Olympic Committee ("USOC") was USA Equestrian, Inc. ("USAE"), formerly known as the American Horse Show Association. (App. A.2, 21) As of June 1, 2004, USEF began performing its duties as the one and only NGB for equestrian sport. (App. A.21) Since that date, USEF has exercised the authority and borne the responsibilities and obligations of an NGB. (App. A.21) As such, it has promulgated and enforced rules regarding equestrian events, including hunter/jumper competitions. (R. 289-2/3/9-11)

In keeping with NGB eligibility requirements, *see generally*, 36 U.S.C. § 220522(a)(7), (9)-(10), membership in USEF is open to any individual who is an active participant in equestrian sport as well as to all amateur, not-for-profit organizations that conduct programs in equestrian sport; by its own bylaws, USEF membership is open to others as well. (R. 302, Bylaw 201) Its over 80,000 members across 27 breeds and disciplines include participants in athletic competitions (for example, rider-athletes, trainers, horse owners, judges, and other licensed officials), not-for-profit amateur sports organizations, and for-profit promoters like Petitioners and the other Defendants-Respondents who put on amateur competitions. (App. A.2, 21; R. 289-2/4/16; R. 302, Bylaw 201) No less than 20% of the voting power on the Board of Directors that governs USEF is held by athletes who are actively

---

[2] The USEF Bylaws and the Rule Books for the 2004, 2005, and 2006 competition years are available for viewing or download through the USEF website. The respective URLs are <http://www.usef.org/content/bylaws> and <http://www.usef.org/content/rules> (last visited Dec. 18, 2006).

engaged in equestrian competition or who have represented the United States in international amateur equestrian competition within the past ten years. (App. A.2-3; R. 302, Bylaw 302(1) and 289-2/4/13); *see also* 36 U.S.C. § 220522(a)(10).

B. The NGB Competition Rules

When it became the NGB in June 2004, USEF adopted as its own the rules promulgated by USAE, to ensure that all the NGB regulatory and governance responsibilities could be and would be carried out and to maintain continuity for the 2005 competition year. (App. A.2; R. 289-2/3/9) USEF subsequently made substantive changes to the rules. (App. A.2, 23; R. 289-2/3/11) The Mileage Rule that was the subject of Petitioners' antitrust claims and is challenged in this Petition is the version of General Rule 214 that was promulgated by USAE and adopted by USEF in June 2004. (App. A.3-4, 22-23; USAE GR 214[3]) In relevant part, USAE GR 214.2 provided that the distance between recognized competitions held on the same date must be at least a "250-mile radius for competitions with any of the same A rated sections" or with jumper sections (which are unrated) "with total prize money of $10,000 or more." (App. A.22) This minimum-distance restriction applied to competitions in all 27 breeds and disciplines held throughout the United States and Canada, including recognized hunter/jumper competitions in Florida and all but certain Northeastern states.[4] (App. A.4)

---

[3] USEF refers in this brief to the version of a rule promulgated by USAE and adopted by USEF in June 2004 as "USAE Rule 214" and abbreviates General Rule to "GR."

[4] Recognized hunter/jumper competitions in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York,

(Continued on following page)

To hold a recognized competition, a promoter must secure NGB approval for the competition on particular dates at a specific location. USAE GR 210.1-.4. Under the USAE rules, such approval generally would not be given if there was already an "established" recognized competition within the minimum distance on overlapping days. (R. 288-2/7-11/GR 212.1, GR 214.7) For most competitions, all that was needed to secure recognition despite the mileage restrictions was an agreement in writing by "all affected competition managements." (App. A.4; R. 288-2/9-10/GR 214.6) However, for competitions involving the hunter/jumper disciplines, deviation from the general mileage restriction required not only that written agreement, but the agreement had to be obtained each year, the distance between competitions could be no less than ten miles, and the proposed additional competition had to have different management from the established competition. (App. A.4)

The USEF's Board passed substantive rule changes in January 2005, which first went into effect for the 2006 competition year (from December 1, 2005, to November 30, 2006). (App. A.2, 23; R. 289-2/3/11) Among the changes was the enactment of a "license agreement" regime under which USEF has the explicit right to refuse renewal of a now-established competition's license if it fails to satisfy certain objective standards. (App. A.23) Concomitant revisions

---

New Jersey, and Pennsylvania are governed by GR 214.1. The required distance between such competitions with A-rated (or equivalent) sections or classes is at least 125 miles. (App. A.4, 22) Contrary to Petitoners' innuendo (Petition p. 5 n.4), the American Horse Shows Association ultimately won the cited case, *Ashley Meadows Farm, Inc. v. American Horse Shows Ass'n*, 609 F. Supp. 677 (S.D.N.Y. 1985), which included an antitrust challenge to an earlier version of the Mileage Rule.

provide USEF with the explicit authority to grant or deny a license to a competition otherwise barred under the Mileage Rule regardless of whether the "established" competition agrees to the deviation from the mileage restriction. (App. A.23-24; R. 289-2/3/11; GR 212, 213, 214.5) By their plain language, the revised rules give "USEF ultimate control over the granting or denying of waivers under the Mileage Rule." (App. A.23; *see also* R. 363-6; App. A.36 n.17)

C. Promoter Profits and Athletic Competition

As USEF members, Petitioners have conducted NGB-recognized competitions at facilities in Florida; they have also conducted unrecognized equestrian competitions at the same facilities.[5] (App. A.5, 24-26; R. 317-14/2/3-4; 317-14/5-6/9 & 11; 317-18/2/8-9) The non-profit and for-profit promoters that were named as defendants in Petitioners' lawsuit, including the other Respondents, are also USEF members. (R. 293-2/4/13) Respondent promoters have conducted A-rated competitions in Florida and elsewhere in the United States, but have also held unrecognized competitions in Florida. (App. A.5, 26-27; R. 293-2/3/7-8; R. 286-2/2, 4/3-5,10) It was and is undisputed that USEF does not promote, operate, or manage horse shows. (App. A.21) It does not participate as a promoter, operator, or manager of hunter/jumper competitions in Florida in the winter months. (R. 289-2/5/17) There is no evidence that USEF profits from recognizing competitions or from its

[5] There is no NGB rule requiring that members exclusively participate in or promote recognized competitions. There are limitations only on including unrecognized classes within a recognized competition. (R. 302; GR 211)

rules' restrictions on A-rated competitions generally, or with respect to hunter/jumper competitions specifically.[6]

Before the District Court, it was undisputed that USEF acts in a "regulatory" capacity as the NGB, limiting and controlling both the athletes who compete in and the promoters who conduct recognized competitions. The USEF Bylaws place the power to promulgate rules in the hands of its 54-member governing Board of Directors. (App. A.2; R. 302, Bylaw 301 Section 1(2); *see also* App. A.29) Only ten of the Board members represent the hunter/jumper equestrian communities, and because at least two of those ten must be active athletes or have represented the United States in international amateur equestrian competition (App. A.29; R. 289-6/10, Bylaw 302 Section 1; R. 289-2/4/13), the influence of hunter/jumper promoters on the Board is circumscribed.[7]

Petitioners' stated objective was to conduct recognized A-rated hunter/jumper competitions at their Florida facilities during the four winter months (December-March). (App. A.5, 31) According to Petitioners:

> Holding an A-Rated Show rather than a show with a lower rating enables promoters to charge the highest entrant and attendee fees, obtain the largest corporate sponsorship fees, and to sell ancillary services (such as horse stall rentals, bedding, feed, grooming supplies, and the sale of food and beverages to exhibitors and spectators)

---

[6] The USEF does not auction off competition licenses to the highest bidder; there is a small application fee. The annual fees and dues assessed a recognized competition are not based on the revenues or profits from the competition. (R.302; GR 215)

[7] Only one of the promoter defendants is (or has been) a USEF Board member: Thomas Struzzieri. He was elected to that Board position in January 2005. (App. A.26, 29; R. 289-2/4/13)

> at the highest rates. Promoters also profit from developing real estate adjacent to horse show venues as residences for riders who desire to remain in Florida throughout the Winter Season. Real estate near venues for A-Rated Shows is worth more than real estate near venues for lower rated shows.

(Petition p. 4) Thus, to Petitioners, equestrian competition is not about the athlete, but is a product to be sold to participants (entry fees), equine and equestrian goods and service providers (exhibitor and advertising fees), and spectators (admission fees) – and to be bundled as an amenity for real estate development schemes. (I.B. pp. 14-15; R. 317-14/7-8/14-16)[8] Petitioners presented evidence that they applied to the previous NGB for recognition of A-rated competitions on certain winter dates, but were informed that there were established competitions within the mileage restriction; when they asked established competition managers (including the promoter defendants) for written agreements to deviate from the Mileage Rule, those requests were denied. (Petition p. 6; I.B. p. 23)

To the NGB, "competition" is about the athletes – both horses and riders. Identifying who should represent the United States in international competitions, developing the next generation of elite athletes, and fostering grassroots participation and innovation in equestrian sport are core parts of the vision and mission of USEF as the NGB for equestrian sport. (R. 302, Bylaw 102, Section 1; *see, generally*, 36 U.S.C. §§ 220523, 220524) The operation of the competition rules, including the Mileage Rule, limits the number of highest-rated hunter/jumper competitions

[8] The citation "I.B." refers to the initial brief that Petitioners filed in the Court of Appeals.

in the same time period in any given area. This concentrates the elite athletes at those competitions, forcing "the best of the best to compete with each other." (R. 289-10/2/21-23; R. 289-8/2-3/6; *see also* App. A.48-49) With two or more A-rated competitions in close geographic proximity conducted at the same time, it is less likely that the best horses and athletes will compete against one another. (App. A.12, 48-49; R. 289-8/2-3/6)

Limiting recognition of like competitions in close proximity on overlapping days has fostered the development of equestrian sport across the United States, not just in former regional centers such as the Northeast. (R. 289-11/5/6-9; R. 289-11/2-3/13-4) The number of competitions has consistently increased, with 2,507 recognized competitions being held in 2004. (R. 289-2/4/16) Additionally, the Mileage Rule promotes the health and welfare of horses by limiting incentives for horse owners to overuse their horses by chasing "points" and prize money at multiple competitions on the same or proximate days in the same geographic area. (App. A.12-13, 49; R. 289-8/3/7)

The Mileage Rule also leads to the dispersion of these elite competitions throughout the United States and throughout the year. A promoter who cannot hold an A-rated competition at an already-served location and time may then expand the opportunities for the athletes by locating such an elite level competition in an underserved region or at an otherwise empty spot on the calendar.[9] If determined to hold a horse show at that location and time, a promoter may do so by offering a different competition, for example, one with B- or C- level hunter/jumper

[9] For example, Petitioner JES Properties, Inc. conducted A-rated competitions in Florida during the summer months. (App. A.24; R. 317-14/5-6/11)

divisions or an unrecognized competition at which there can be innovations in the sport not yet allowed within the NGB rules.[10]

D. The Proceedings and Disposition in the District Court

Petitioners began their action in the District Court in August 2002, asserting federal antitrust claims against several promoters of hunter/jumper competitions in Florida and against USAE, the former NGB for equestrian sport in the United States. (R. 1; *see also* App. A.18) In amended complaints filed in April 2003 (R. 42) and January 2004 (R. 82), Petitioners expanded their claims to include state antitrust and unfair trade practice claims and to name additional defendants. Among the defendants added in January 2004 was USEF. (App. A.18-19)

In the second half of 2004, Petitioners settled with various defendants, including USAE, and the claims against those defendants were dismissed. (App. A.18 n.1) Then, in December 2004, Petitioners sought and obtained leave to file yet another amended complaint (R. 258), adding one more defendant and alleging violations of the Sherman Act §§ 1 and 2 and the parallel Florida laws, FLA STAT. ch. 542.18 and 542.19. (App. A.19-20) After the close of discovery, in February 2005, USEF and other remaining defendants moved for summary judgment on all counts of Petitioners' latest amended complaint. (R. 287, 290, 292, 294; *see also* App. A.20)

---

[10] Petitioners have conducted such lower-rated and unrecognized competitions, as have the promoter defendants. (App. A.24-28; R. 317-14/5-6/11)

On May 9, 2005, the District Court issued an order ruling that undisputed facts established that the defendants were entitled to judgment as a matter of law. (App. A.17-57; R. 363) The District Court first considered the contention that the ASA provided implied antitrust immunity in connection with the establishment and enforcement of the Mileage Rule. (App. A.32) The court recognized that "[a]s the NGB for equestrian sport in the United States, USEF performs many functions including the promulgation of scheduling and competition rules such as are at issue in the present case." (App. A.34) The court further noted that the Act "requires USEF, as the NGB for equestrian sport, to coordinate amateur equestrian activity in the United States and to minimize scheduling conflicts." (App. A.34-35) Observing that "[s]cheduling is central to the governing of any sport," the court concluded that the Mileage Rule, given its conceded effectiveness in minimizing scheduling conflicts, "is exactly the type of action which the Amateur Sports Act directs." (App. A.35) The court therefore held that "the Mileage Rule should be exempted and Plaintiffs' antitrust claims against USEF should be barred since USEF's Mileage Rule minimizes scheduling conflicts and implements Congress' intent with regard to the governance of amateur athletics." (App. A.36)

As an alternative ground for summary judgment, the District Court held that Petitioners lacked standing because they failed to demonstrate that they suffered antitrust injury. (App. A.37-39) A further alternative basis for granting summary judgment on the claim under Sherman Act § 1 was that Petitioners had failed to present evidence sufficient to demonstrate elements necessary to prove a violation. Specifically, Petitioners (1) presented no credible evidence of a conspiracy or other concerted action in restraint of trade (App. A.40-43), and (2) failed to show

that the Mileage Rule operated as an *unreasonable* restraint of trade (App. A.43-49).

The District Court disposed of Petitioners' claims against USEF under Sherman Act § 2 (for alleged monopolization, attempt to monopolize, and conspiracy to monopolize) by finding that Petitioners had failed to present any evidence that USEF competed in the relevant market. (App. A.50-51) As to the monopolization claims against the promoter defendants, the court held that Petitioners had not submitted sufficient evidence that those defendants shared, attempted to share, or conspired to share monopoly power in the relevant market. (App. A.51-54) Noting that the state-law claims were subject to the same rules that required summary judgment on the federal antitrust claims, the court also entered summary judgment against Petitioners on those claims. (App. A.54-56)

Judgment was entered the next day, closing Petitioners' case. (R. 364) Petitioners appealed generally from that judgment to the United States Court of Appeals for the Eleventh Circuit, but they limited their appeal to the Sherman Act § 1 claims and related state-law claims. (*see* App. A.6) Issues particular to their federal and state monopolization claims were abandoned before the Court of Appeals.

E. The Decision of the Court of Appeals

In a decision rendered August 2, 2006, the Court of Appeals affirmed the District Court's summary judgment in its entirety. (App. A.1-16) The court concluded that the defendants are immune from antitrust liability under the circumstances of this case. (App. A.6, 12-15) Specifically, the court held that the Act impliedly repealed the antitrust laws to the extent that USEF was acting pursuant to

the auth[illegible]y conveyed to it by that act in promulgating and enfo[illegible]g the Mileage Rule. (App. A.7, 12-15)[11]

Recognizing that repeal of the antitrust laws by implication is not to be lightly inferred and requires a plain repugnancy between the antitrust statutes and the other statutory provisions (App. A.8), the court addressed the argument "that the ASA confers on the USEF the authority to promulgate the Mileage Rule [coordinating schedules] and that application of the antitrust laws to the enforcement of the Mileage Rule is plainly repugnant to that authority." (App. A.10) After examining decisions from other circuits, the Court of Appeals concluded that "the 'monolithic control' a NGB has over its particular [sport] may excuse actions that would otherwise violate antitrust laws." (App. A.12) Thus, the court examined whether "the application of the antitrust laws to the facts of this case would unduly interfere with the operation of the ASA." (App. A.12 (internal quotation marks omitted)) The court identified how the Mileage Rule was part of the intended operation of the Act, and specifically the requirements in 36 U.S.C. § 220524 "to minimize conflicts in the scheduling of competitions and to 'develop interest and participation throughout the United States' in their particular sport." (App. A.12-A.13) The Mileage Rule thus was "an exercise of the 'monolithic control' Congress conferred on the USEF." (App. A.13)

The Court of Appeals rejected Petitioners' contention that "if the USEF and equestrian sports can function without the Mileage Rule, the USEF and the Promoter Defendants are not entitled to immunity." (App. A.13) The court concluded that Petitioners' understanding of what

[11] The court declined to reach the question of whether Petitioners had standing or suffered antitrust injury. (App. A.6-8)

makes a rule "necessary" was "too restrictive." (App. A.14) Instead, the pertinent inquiry, according to the court, was whether a recognition of USEF's general authority to promulgate and enforce rules such as the Mileage Rule was "necessary" to enable it to function as Congress envisioned an NGB would function under the Act – not whether that particular rule was "wise or indispensable." (App. A.15)

> This Court will not substitute its own judgment for that of the USEF regarding the optimum way to fulfill its obligations. If this Court were to apply the test that [Petitioners] JES and Mr. Gallagher suggest – determining whether the Mileage Rule is necessary – it would threaten the national uniformity Congress envisioned in enacting the ASA. This inability to engage in the analysis [Petitioners] suggest without disrupting the ASA illustrates why implied immunity is called for in this case. The question before this Court is whether the application of antitrust laws to the actions of the USEF and the Promoter Defendants is "plainly repugnan[t]" to the ASA. *Gordon*, 422 U.S. at 682. . . . . Because the ASA requires an NGB to promulgate rules to minimize conflicts in schedules, the imposition of antitrust liability for the promulgation of such a rule is "plainly repugnan[t]" to the ASA.

(App. A.15 (some citations omitted)) The Court of Appeals therefore affirmed the summary judgment in the defendants' favor. (App. A.16)

REASONS FOR DENYING THE WRIT

I. The same standard was applied by the Eleventh Circuit to the Amateur Sports Act as was applied by this Court in *Silver*, *Gordon*, and *NASD* to the statutorily-established scheme for regulating securities transactions.

1. The Eleventh Circuit's decision was not as caricatured in Petitioners' second Question Presented. The appellate court concluded that one rule promulgated by the NGB for equestrian sport, the Mileage Rule, was within the repeal of the antitrust laws implied by ASA provisions mandating that NGBs minimize scheduling conflicts and "develop interest and participation throughout the United States." Furthermore, it reached that conclusion in the context of a District Court determination on summary judgment that the antitrust defendants' challenged actions were not an unreasonable restraint of trade. Thus, Petitioners' presented question of whether this Court's decisions preclude a holding "that any and all rules promulgated by an NGB under the ASA are impliedly exempt from antitrust scrutiny as a matter of law, no matter their admitted anti-competitive effects" is purely hypothetical.

Petitioners repeatedly mischaracterize the Eleventh Circuit's decision as granting "blanket antitrust immunity" to "any and all rules adopted by an NGB." Petition pp. 7, 8, 9, 11, 12. In reality, the Eleventh Circuit's opinion speaks to *one* rule (the Mileage Rule) adopted by *one* NGB (USAE, the predecessor NGB to Respondent USEF). Furthermore, although the 250-mile limit of GR 214.2 is generally applicable to all 27 breeds and disciplines within USEF, the Petitioners' particular challenge was to a now-superceded portion of the Mileage Rule that applied only to A-rated (or equivalent) hunter/jumper competitions. The

rulings of both the District Court and Eleventh Circuit do not give "blanket antitrust immunity" to any NGB rule. The summary judgment was specific to Petitioners' antitrust claims against the old version of the Mileage Rule as it applied to the relevant market claimed by Petitioners: A-rated hunter/jumper competitions held in Florida during the four winter months. *See* App. A.24.[12]

In addition, there was no concession or admission in this case that the USAE Mileage Rule had anticompetitive effects, despite Petitioners' persistent assertion that there was. Petition pp. 5, 6 n.7, 8. The portion of the District Court opinion cited actually states that "since the Defendants do not specifically address whether the alleged violative conduct has restrained competition in the Relevant Market, for purposes of its rule of reason analysis, this Court will presume without finding that Plaintiffs have demonstrated an anticompetitive effect in the Relevant Market." App. A.46.[13] As in the District Court and the Eleventh Circuit, Petitioners here fail to articulate what anticompetitive effect is claimed to have resulted from the Mileage Rule. Other than the restraint that is effected by any regulation and contract, *see Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918), Petitioners presented no facts establishing that there was any arguably anticompetitive effect. They appear to be most exercised about the now-superseded portion of the Mileage Rule, USAE 214.7, which allowed for a new competition within the 250-mile limit to be recognized if the existing

---

[12] Although there was a dispute about the definition of the relevant market, the District Court addressed the summary judgment motions as if the relevant market was as Petitioners defined it. App. A.24 n.10.

[13] The Court then went on to determine that pro-competitive effects of the Mileage Rule outweighed any anticompetitive effects. App. A.47-49.

competition management waived the limit.[14] That allowance, however, was clearly *pro-competitive* relative to an absolute 250-mile exclusion.

The question presented thus is no more than a hypothetical with no connection to any articulated dispute in this litigation. Such an abstract proposition is not a proper basis for grant of a writ of certiorari. *See Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117, 118 (1994) (per curiam) (dismissing writ as improvidently granted on conclusion that case "would require us to resolve a constitutional question that may be entirely hypothetical"); *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (dismissing writ as improvidently granted because the issue posed was no longer "in the context of meaningful litigation"). This Court has long refused to issue advisory opinions, *see Hayburn's Case*, 2 Dall. 409, 1 L.Ed. 436 (1792), and Petitioners can present no compelling reason to review a hypothetical "decision" that was never issued by the Eleventh Circuit.

2. The Eleventh Circuit's finding of implied repeal is consistent with this Court's decisions addressing the interaction between the antitrust laws and the regulatory scheme established by the securities laws. The Eleventh Circuit properly examined whether "antitrust immunity, as a matter of law, must be implied in order to permit the [Act] to function as envisioned by Congress," *Gordon* v. *New York Stock Exch.*, 422 U.S. 659, 688 (1975), and

[14] Petitioners misleadingly characterize the old version of the rule, USAE GR 214.7, as providing that "if an incumbent promoter decides, in its sole discretion, to grant a Mileage Rule waiver, the 250-mile radius of exclusion is reduced to 10 miles." Petition p. 11 n.8. It would be more accurate to state that no waiver could be effective if the other show was within 10 miles of the existing show.

declined to examine whether the particular rule challenged was a wise one or necessary to the operation of the NGB.

It is ironic that Petitioners attempt to portray the Eleventh Circuit as granting immunity "regardless of anticompetitive effects," because such a decision would not be inconsistent with the three cited cases from this Court. *Silver* v. *New York Stock Exch.*, 373 U.S. 341 (1975), *United States* v. *NASD*, 422 U.S. 694 (1975), and *Gordon* each considered immunity *despite* the fact that the challenged conduct was otherwise a *per se* violation of the antitrust laws. *Silver*'s starting point was a recognition that the challenged "collective action of the Exchange and its members would, had it occurred in a context free from other federal regulation, constitute a *per se* violation of § 1 of the Sherman Act. . . ." 373 U.S. at 347. "Hence, absent any justification derived from the policy of another statute or otherwise, the Exchange acted in violation of the Sherman Act." *Id.* The *Gordon* Court noted that the challenged conduct of the Exchange and its members constituted price fixing and that legislative permission for "the fixing of commission rates under the supervision of the SEC occurred seven years after this Court's decision . . . to the effect that price fixing was a *per se* violation of the Sherman Act." 422 U.S. at 682. It was likewise recognized in *NASD* that the restrictive agreements at issue there "normally would constitute *per se* violations of § 1 of the Sherman Act." 422 U.S. at 729.

Silver, *Gordon*, and *NASD* each examined whether implied repeal of the antitrust laws was necessary to make the securities statutes work as Congress intended. The task presented was to "reconcile pursuit of the antitrust aim of eliminating restraints on competition with the effective operation of a public policy contemplating that securities exchanges will engage in self regulation which may well have anticompetitive effects in general and in

specific applications." *Silver*, 373 U.S. at 349. The three decisions addressing antitrust immunity cannot be divorced from their context, which required consideration of the particular conduct that was challenged and the relevant portions of the Securities Exchange Act, Investment Company Act, or Maloney Act. The "general policy of self-regulation by the exchanges coupled with oversight by the SEC," *Gordon*, 422 U.S. at 667 (referring to the Exchange Act), required that the antitrust laws give way with respect to the fixed commission rates challenged in *Gordon*, 422 U.S. at 691, and the restrictive agreements challenged in *NASD*, 422 U.S. at 730, 735.[15] Implied repeal was not necessary in *Silver*: although the exchange rules were within "the statutorily imposed duty . . . to formulate rules governing the conduct of exchange members," 373 U.S. at 353, the Exchange's particular enforcement of those rules that was challenged by Silver was not expressly directed or authorized by the Exchange Act and the SEC had not been given authority to oversee such enforcement actions. *Id.* at 357.[16]

The complexities of analyzing challenges to specific actions that were authorized but not mandated by the applicable statute and of considering the regulatory authority and actual activity of the SEC consume *Gordon* and most of *Silver* and *NASD*. For one challenge, however, the exemption decision was much simpler. In *NASD*, because § 22(d) of the Investment Company Act expressly

---

[15] By limiting the implied repeal to the circumstances presented, *Gordon* and *NASD* kept the antitrust laws from being completely ousted.

[16] Reconciliation with the antitrust laws did require, however, that the otherwise *per se* antitrust violation would be examined under the rule of reason for justification as being within the scope and purposes of the Exchange Act. 373 U.S. at 360.

required maintenance of a uniform price with respect to mutual fund sales, "no question exists that antitrust immunity must be afforded these sales." *NASD*, 422 U.S. at 699. On this point, the *NASD* dissenters were in agreement: "If Congress itself expressly permits or directs particular private conduct that would otherwise violate the antitrust laws, it can be safely assumed that Congress has made the necessary policy choices and preferred to permit rather than to prevent the acts in question." *Id.* at 736 (White, J., dissenting).

Since this Court has never considered a question of whether the ASA impliedly repeals another statute,[17] the Eleventh Circuit relied on *Silver*'s general warning that "repeals by implication are not favored," 373 U.S. at 358 (internal quotation marks omitted), and the more specific principle that repeal of the antitrust laws should be implied "only if necessary to make the [other statute] work, and even then only to the minimum extent necessary." *Id.* The Eleventh Circuit looked to decisions which followed the *Silver* principles in examining the interaction between the ASA and the antirust laws to determine whether the challenged conduct was exempted. The end result was the same as in *Gordon* and *NASD*, and was consistent with *Silver,* because the ASA expressly directs an NGB to "minimize . . . conflicts in the scheduling of all practices and competitions. . . ." 36 U.S.C. § 220524(2).

The Eleventh Circuit specifically considered and rejected Petitioners' contention that, before the antitrust laws give way, the Mileage Rule and all its particulars

[17] In *San Francisco Arts & Athletics* v. *United States Olympic Committee*, 483 U.S. 522 (1987), this Court upheld the grant to the USOC of an exclusive right to the use of the word "Olympic" in 36 U.S.C. § 220506(a)(4).

must be shown to be necessary to Congress' intended operation of the ASA. In reaching its decision, the court relied upon *Gordon*'s holding that implied immunity was not a "factual question as to whether fixed commission rates are actually necessary to the operation of the exchanges as contemplated under the Securities Exchange Act." App. A.14 (quoting *Gordon*, 422 U.S. at 688). An NGB must promulgate certain rules to carry out its express duties and intended role under the ASA. App. A.9-10. Thus, interposition of the antitrust laws, which might bar a scheduling rule that potentially limits the number of competitions, would be plainly repugnant to the system established by Congress that there be one and only one NGB per Olympic sport, with the duty and authority to minimize scheduling conflicts and otherwise regulate the sport. *Silver*, *Gordon,* and *NASD* did not consider whether Congress was correct to have authorized that there be a rule, whether the rule promulgated was "necessary," or if a different rule would have fewer competitive effects. Petitioners provide no reason that such a requirement should now be read into this Court's decisions.

II. The Eleventh Circuit's application of this Court's principles regarding implied repeal is consistent with *Billing* and in accord with other Circuits' decisions about implied repeal by the Amateur Sports Act.

1. Petitioners argue that the Second Circuit's opinion in *Billing* v. *Credit Suisse First Boston Ltd.*, 426 F.3d 130 (2nd Cir. 2005) and the Eleventh Circuit's opinion here result in a "circuit split" regarding implied repeal of the antitrust laws. To the contrary, no conflict exists because each decision proceeds from the same fundamental principles, addresses specific statutes, and shapes the analysis

to conform to the circumstances presented. Petitioners' attempt to manufacture a conflict thus fails.

Though faced with substantially different circumstances, the Second Circuit and the Eleventh Circuit applied the same basic principles established by this Court in *Silver* and *Gordon*. Each opinion discussed how implied immunity can be found only in the face of a "plain repugnancy between the antitrust and regulatory provisions," App. A.8, and that "repeal is to be regarded as implied only if the repeal is necessary to make the regulatory provisions work," App. A.8. *See also Billing*, 426 F.3d at 146-47. Both decisions agree that "the crux of the implied immunity claim [is a] demonstration that Congress clearly intended a repeal of the antitrust laws." *Id.* at 168. In exploring Congress' intent, the Eleventh Circuit in this case and the Second Circuit in *Billing* properly focused on different considerations because different statutes are involved. *See Phonetele, Inc.* v. *AT&T*, 664 F.2d 716, 727-28 (9th Cir. 1981) (noting that "there is no simplistic and mechanically universal doctrine of implied antitrust immunity; each of the Supreme Court's cases is decisively shaped by considerations of the special aspects of the regulated industry involved").

Billing presented issues involving complex securities regulation, while this case deals with regulation of amateur sports under the ASA; the Second Circuit drew upon the host of decisions examining antitrust immunity in the securities industry, while the Eleventh Circuit properly looked to decisions from the Tenth and Fifth Circuits that discussed the interplay between antitrust laws and the ASA. In its opinion, the Eleventh Circuit also specifically addressed the Second Circuit's decision in *Billing*, noting that "[r]egardless of whether *Billing* would require a more searching scrutiny of the Mileage Rule, this Court follows the more closely analogous holdings in *Behagen* and *Eleven Line*." App. A.16. No conflict arises from the mere fact that

the Eleventh Circuit looked to different considerations than did the Second Circuit. *See Phonetele*, 664 F.2d at 727-28.

Petitioners attempt to manufacture a conflict between *Billing* and this case by arguing that *Billing* stands for the proposition that a court must scrutinize the specific rule promulgated "to determine its reasonability and whether antitrust immunity for the conduct at issue is essential to enable Congress' intent in enacting the regulatory statute." Petition p. 10. This is incorrect. The Second Circuit noted that when a specific conflict exists between a regulatory rule and antitrust laws, "we will apply immunity if we determine that Congress contemplated the specific conflict and intended for the antitrust laws to be repealed." *Billing*, 426 F.3d at 164. The Second Circuit did not hold that the specific rule must be subjected to a "reasonability" analysis or that the particular regulation must be essential to enable Congress' intent. Instead, it focused on the regulatory statute at issue and its potential conflict with the antitrust laws – as did the court here in finding that application of the antitrust laws to the challenged conduct was plainly repugnant to the Act. App. A.9-13.[18]

Moreover, Petitioners assert that *Billing* requires the application of a multi-factor test to determine whether the Act impliedly repeals the antitrust laws, and that the Eleventh Circuit erred in this case by failing to apply each of the factors. Petition p. 7. The Second Circuit listed various factors – including legislative history and construction of the statute at issue, the possibility for conflicting mandates, the history of agency regulation of the

[18] The Eleventh Circuit properly dismissed the need for a "reasonability" analysis of the Mileage Rule because the particulars of the rule were not the focus of the inquiry; the question was whether promulgating scheduling rules is necessary for USEF to carry out its duties under the Act. *Id.*

anticompetitive conduct, and any other evidence indicating implied repeal – and explained that they inform the inquiry into Congress' intent when considering a statute that creates or contemplates oversight by a regulatory agency. *Billing*, 426 F.3d at 164-65.[19] *Billing* cannot be read to mandate an across-the-board application of the factors to different types of statutes or in all situations.

Furthermore, in this case, the Eleventh Circuit thoroughly reviewed the Act, its history, and prior cases interpreting its language to determine Congress' intent in passing the statute. After that review, the Court ultimately agreed with the Fifth Circuit that "'the directives of the [ASA made] the intent of Congress sufficiently clear.'" App. A.11 (internal quotation marks omitted). As such, the immunity analyses used by the Second Circuit in *Billing* and the Eleventh Circuit in this case in no way create the "sharp conflict" between the Circuits alleged by Petitioners. Both courts applied the basic implied repeal principles established by this Court and shaped their analyses to properly address the specific facts and claims presented for review.

2. The only previous Circuit decisions about implied repeal of the antitrust laws by the Act are *Behagen* v. *Amateur Basketball Ass'n*, 884 F.2d 524 (10th Cir. 1989), and *Eleven Line, Inc.* v. *North Texas State Soccer Ass'n, Inc.*, 213 F.3d 198 (5th Cir. 2000). The Eleventh Circuit correctly identified these as the closest persuasive authority, and its

---

[19] In other recent cases that did not involve the securities industry, the Second Circuit determined antitrust exemption questions without applying the particular analysis and factors articulated in *Billing*. *See, e.g.*, *Clarett* v. *National Football League*, 369 F.3d 124, 135 (2nd Cir. 2004) (holding that NFL player eligibility rule fell within scope of nonstatutory exemption to antitrust review implied from federal labor laws).

holding is not in conflict with either decision. The holding is also consistent with decisions addressing conflict between the Act and other federal statutes, and with decisions about implied repeal of the antitrust laws by federal statutes assigning specific responsibilities and duties to private entities.

The Tenth Circuit held in *Behagen* that the Act impliedly repealed the antitrust laws with respect to a claim that the NGB's refusal to reinstate Behagen's amateur eligibility constituted a group boycott in violation of Sherman Act § 1. The challenged "actions in this case were clearly within the scope of activity directed by Congress and were necessary to implement Congress' intent with regard to the governance of amateur athletics." 884 F.2d at 527. The court found that "the monolithic control exerted by an NGB over its amateur sport is a direct result of the congressional intent expressed in the Amateur Sports Act." *Id.* at 528 & n.4. The Act clearly included within that "monolithic control" the subject of "amateur eligibility for Americans that participate in the sport." *Id.* at 529 (citing 36 U.S.C. §§ 391(b)(12), 393(7), now codified as 36 U.S.C. §§ 220522(a)(14), 220523(a)(7)). The Tenth Circuit did not scrutinize the "necessity" of the particular reinstatement rule applied by the NGB or whether a more-liberal reinstatement policy that would allow Behagen to participate in amateur athletic competitions would have been possible under the Act.[20] Furthermore, although the NGB was authorized (but not mandated) to "establish procedures for determining eligibility standards for participation in competition," 36 U.S.C. § 220523(a)(5), the

[20] Although the Act requires that an NGB not have "eligibility criteria related to amateur status . . . that are more restrictive than those of the appropriate international sports federation," 36 U.S.C. § 220522(a)(14), it does not proscribe *less restrictive* criteria.

Tenth Circuit found that the American Basketball Association "could not be authorized under the Act unless it maintained exactly that degree of control over its sport that Behagen here alleges as an antitrust violation." 884 F.2d at 529 (citing 36 U.S.C. § 391(b)(4), now codified as 36 U.S.C. § 22052(a)(5)).

Other courts have built from the foundation provided by *Behagen*. For example, it has been held that "Congressional intent to require athletes to exhaust their administrative remedies in regard to eligibility disputes appears evident given the scope of the Act, the specific statutory mechanisms that have been established for speedy settlement of these disputes, and congressional intent to establish a centralized, monolithic structure for coordinating amateur athletics." *Barnes* v. *International Amateur Athl. Fed'n*, 862 F. Supp. 1537, 1544 (S.D. W.Va. 1993). In *Eleven Line*, the Fifth Circuit stated that "the *Behagen* case was correctly decided," but rejected an implied-repeal argument by the North Texas State Soccer Association, a regional amateur sports organization for soccer. Eleven Line claimed that the association's membership rule requiring that players, coaches, and referees play soccer only at "sanctioned" facilities effected a group boycott of its non-sanctioned arena in violation of Sherman Act § 1. The Fifth Circuit distinguished *Behagen* on the basis that the rule in question had neither been promulgated nor expressly approved by the NGB. If it had been, "it would be a player eligibility rule exempted under *Behagen*. . . ." 213 F.3d at 205.

Unlike the rule challenged in *Eleven Line*, the Mileage Rule that Petitioners challenge was promulgated by the NGB for equestrian sport. Like the rule challenged in *Behagen*, the Mileage Rule is on a subject placed within the monolithic control of the NGB – the scheduling of competitions. The Act not only authorizes USEF (and

before that, USAE) to "serve as the coordinating body for amateur athletic activity in the United States," 36 U.S.C. § 220523(a)(3) – it mandates that it "minimize . . . conflicts in the scheduling of all practices and competitions," 36 U.S.C. § 220524(2). Under those circumstances, the only decision by the Eleventh Circuit that could be in accord with the opinions of other Circuits expressed in *Behagen* and *Eleven Line* was to hold that the Act impliedly repealed the antitrust laws with respect to Petitioners' challenge to the Mileage Rule.

In addition, the Act has been held to impliedly repeal or preempt laws other than the antitrust statutes. *See, e.g., Lee* v. *United States Taekwondo Union*, 331 F. Supp. 2d 1252, 1260-61 (D. Hawaii 2004) (finding that the later and more specific ASA governed at points of conflict with the Civil Rights Act, 42 U.S.C. § 1981, and that deference to NGB decisions also precludes discrimination claims or remedies therefor that would conflict with sport governance); *Slaney* v. *International Amateur Athl. Fed'n*, 244 F.3d 580, 596 (7th Cir. 2001) (holding that state-law claims challenging USOC's method of determining plaintiff's eligibility were preempted by the Act), *cert. denied*, 534 U.S. 828 (2001).[21] Courts have also implied from the Act that Congress intended minimal interference with the NGBs and the USOC in areas designated as their responsibility, and have held that there was no implied private right of action or that administrative remedies internal to the NGB or USOC be exhausted before seeking judicial review. *See, e.g., Oldfield* v. *The Athletic Cong.*, 779 F.2d

[21] *See also Walton-Floyd* v. *United States Olympic Comm.*, 965 S.W.2d 35, 40 (Tex. App. 1998) ("To hold a common law duty exists outside the scope of the Act, thereby enabling an individual athlete to bring suit, threatens to override legislative intent and opens the door to inconsistent interpretations of the Act.").

505 (9th Cir. 1985) (amateur status); *Michels* v. *United States Olympic Comm.*, 741 F.2d 155 (7th Cir. 1984) (drug suspension); *DeFrantz* v. *United States Olympic Comm.*, 492 F. Supp. 1181, 1191-92 (D.D.C.) (USOC decision not to enter a team in the Moscow Olympics), *aff'd mem.*, 227 U.S. App. D.C. 210, 701 F.2d 221 (1980).[22] Furthermore, the Eleventh Circuit's holding is in line with other Circuits' decisions that implementation of Congressional mandates by specifically designated entities is exempt from antitrust liability. *See, e.g., McCarthy* v. *Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399, 414 (6th Cir. 2006) (holding that TVA was entitled to antitrust immunity because 16 U.S.C. § 831i authorized it to enter into contracts promoting use of electric power and "concerns about competition would conflict with the fulfillment of TVA's purpose"); *Alpha Lyracom Space Comm'ns, Inc.* v. *Communications Satellite Corp.*, 946 F.2d 168, 174 (2nd Cir. 1991) ("Having created COMSAT to wield monopoly power, along with the other participants in a global satellite system, Congress did not expect that corporation to face antitrust liability in deciding, as a member of INTELSAT, whether and to what extent to permit competition."), *cert. denied*, 502 U.S. 1096 (1992).

---

[22] *See also Barnes*, 862 F. Supp. at 1545-46 (dismissing, for failure to exhaust administrative remedies, complaint about doping violation disqualification from Olympic trials); *Devereaux* v. *Amateur Softball Ass'n of Amer.*, 768 F. Supp. 618, 624 (S.D. Ohio 1991) (holding that court involvement in challenge to NGB's rules and eligibility decision was premature given Act's provision for administrative remedies and arbitration procedures); *Walton-Floyd*, 965 S.W.2d at 39-40 (no implied private right of action for money damages); *Dolan* v. *United States Equestrian Team, Inc.*, 257 N.J. Super. A.D. 314, 608 A.2d 434, 437 (1992) (affirming dismissal of challenge to exclusion from national team, citing "Congressional determination that these types of disputes should be resolved outside the judicial processes").

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAMES M. LANDIS
Counsel of Record
JOHN R. HAMILTON
FOLEY & LARDNER LLP
100 N. Tampa St., Ste. 2700
P.O. Box 3391
Tampa, FL 33601
819-229-2300

KATHERINE K. YUNKER
YUNKER & ASSOCIATES
476 E. High St.
P.O. Box 21784
Lexington, KY 40522
859-255-0629